IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 01-12-2006

CORAM

THE HONOURABLE MR.JUSTICE P.SATHASIVAM

THE HONOURABLE MR.JUSTICE M.E.N.PATRUDU

AND

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

C.R.P.(PD)No.1203 OF 2003

M/s.Hi.Sheet Industries,
a partnership firm carrying
on business at 61-D, D.V.Road,
Ambur Town,
Vellore District. ... Petitioner/Plaintiff.

-vs-

1.Litelon Limited,
having its Office at
No.68, Sipcot Industrial Complex,
Hosur, rep.by its Managing Partner
S.Gokul.

2.S.Gokul

3.M.Sounthirarajan

4.S.R.Gnanam

5.Supreme Industries Ltd.,
Raheja Buildings,
Nariman Point,
Mumbai, rep.by its Chairman
B.L.Taperia,
6/2, Raheja Charlens,
Nariman Point,
Mumbai - 400 021. ... Respondents/Defendants.

Revision filed under Section 115 of CPC against the order dated 24.03.2003, made in I.A.No.589 of 2002 in O.S.No.45 of 1996 on the file of Sub-Court, Hosur.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

For petitioner : Mr.S.V.Jayaraman,
Senior Counsel,
for M/s.P.Mani and
M.Sivakumar.

For respondents 1 & 2 : Mr.P.Sheshadri

For respondents 3 to 5 : No appearance

O R D E R

M.E.N.PATRUDU,J.

1.00. REFERENCE :

1.01. The reference is as per the result of the revision.

1.02. An order rejecting an application for amendment of plaint in a civil suit is challenged before this Court by way of revision.

1.03. Hon'ble Sri Justice K.P.Sivasubramaniam, desirous to have the decision of a larger bench on the subject.

1.04. Lord Chief Justice Hon'ble Sri A.P.Shah directed to list it before us for determining the following.

2.00. ISSUES :

I. Whether an amendment of plaint seeking to claim enhancement of the amount of compensation/damages could be entertained notwithstanding the fact that the amendment is sought for beyond the period of limitation ?

II. Whether Section 40 (2) of the Specific Relief Act would apply to the facts and circumstances of the present case and if so, whether it is mandatory to allow the amendment notwithstanding the bar of limitation ?

III. Whether the constraints prescribed under the proviso to Order 6, Rule 17 CPC in the matter of entertaining application for amendment after the commencement of trial could apply even to a plea for amendment as contemplated under Section 40 (2) of Specific Relief Act ?

3.00.POINTS :

Thus, the points for our decision are:

(1)Whether an amendment of pleading claiming or enhancing damages is barred by limitation ?

(2) Whether such amendment is mandatory under the provisions of Specific Relief Act ? and

(3) Whether such amendment is permissible despite the present proviso to Order 6, Rule 17 CPC ?

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

4.00.ANSWERS :

4.01. We would prefer to declare our decision at first and assign reasons thereafter.

4.02. Accordingly, we hold that

(1) an amendment of pleading on damages is not barred by limitation as a rule, but depends on facts and circumstances of each case.

(2) such amendments are mandatory under Section 40 (2) proviso of Specific Relief Act.

(3) such amendments are permissible even after the commencement of trial.

5.00. DISCUSSION :

5.01. Before we proceed to highlight the reasons for our decision, we may have to note the law on the subject and the legal principles, emerging therefrom since settled by the Apex Court and also this Court in similar cases and then to apply the same to the present case, in order to strengthen our decision.

Law :-

Civil Procedure Code :

5.02. The procedure for amendment of pleadings is as per Order 6, Rule 17 of the Code of Civil Procedure. It reads thus :

> "17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

5.03. The Code of Civil Procedure, 1908, was extensively amended in 1976 and it was further amended by the Amendment Act 1999 known as Act No.46 of 1999 and, thereafter, by Act 22 of 2002. These amendments have come into force with effect from 01.07.2002.

5.04. Prior to the above amendments, Order 6 Rule 17 was as follows :

> "17.Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

5.05. Thus, the proviso is the new addition under the existing procedural law.

Specific Relief Act :

5.06. Section 40 of the Specific Relief Act, 1963, reads as follows :

> "40.Damages in lieu of, or in addition to, injunction
>
> (1) The plaintiff in a suit for perpetual injunction under Section 38, or mandatory injunction under Section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.
>
> (2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint:
>
> PROVIDED that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim."

Limitation Act :

5.07. While so, Section 3 of the Limitation Act is,

> "3.Bar of limitation.- (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence..."

Case Law :

5.08 : Now, it is the time for us to focus on the case law from some of the notable judgments of our times.

5.09. It is well settled by various decisions of the Supreme Court of India as well as the High Courts in India that Court should be extremely liberal in granting the prayer for amendment of pleadings, unless serious injustice or irreparable loss is caused to the other side.

5.10. The latest decision of the Apex Court on the said principle is,

Baldev Singh and Others v. Manohar Singh and Another [1].

Relying on the earlier decisions of the Privy Council and the other judgments of the Supreme Court of India, their Lordships have categorically held that the delay in seeking amendment is not fatal, when no serious prejudice is shown to have caused to the opposite party and the wide and unfettered discretion has been conferred on the Court to allow the amendment of pleadings in such manner and on such terms as it appears

1 *2006 (6) Supreme Court Cases 498*

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

to the court as just and proper.

5.11. In yet another recent decision Rajesh Kumar Aggarwal and Others v. K.K.Modi and Others[2], it is observed that the Court should allow all amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice or prejudice to the other side and the Court should take notice of the subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice.

5.12. The Supreme Court, in para 9 of the Baldev Singh case (1), categorically observed as follows :

> "(9)..... From a bare perusal of this provision, it is pellucid that Order 6 Rule 17 of the Code of Civil Procedure consists of two parts. The first part is that the court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real controversies raised between the parties. Therefore, in view of the provisions made under Order 6 Rule 17 CPC, it cannot be doubted that wide power and unfettered discretion has been conferred on the court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the court just and proper. While dealing with the prayer for amendment, it would also be necessary to keep in mind that the court shall allow amendment of pleadings if it finds that delay in disposal of suit can be avoided and that the suit can be disposed of expeditiously."

5.13. While so, His Lordship Dr.Justice AR.Lakshmanan, through an authoritative and elaborate discussion on Order 6 Rule 17 CPC., in Rajesh Kumar Aggarwal's case (2) , held as follows:

> para "15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.
>
> para 16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

2 2006 (4) SCC 385

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

para 17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed.

para 18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused....the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice,equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

para 19. While considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment."

5.14. The above two latest pronouncements of the Apex Court answer the first and third points of the reference.

5.15. However, we would like to refer to some of the landmark decisions of yester years on the topic.

1) In Charandas v. Amir Khan[3], the Privy Council observed as follows :

"A Court has full power to allow an amendment and though such power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of a case." (emphasis supplied)

3 AIR 1921 PC 50

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

2) In Krishna Ayyar v. Gomathi Ammal[4], it is clearly observed that amendment of relief clause after limitation should not be refused when the facts are already on record and no new case is introduced. In the words of Justice King "The only serious objection,.... is upon the law of limitation. This objection, in our opinion, has no force, because, although para 22 has now been amended, the facts upon which the reliefs, as now formulated in para 22 are claimed, were already part of the plaint when it was first presented. There can be no question, therefore, that it is only at this stage that the plaintiff is putting forward a new case against the defendants."

It is an identical case and the trial Court should have followed it but for the later division bench case.

3) In L.J.Leach & Co.Ltd. v. M/s.Jardine Skinner and Co.[5] at paras 15,16, it is observed as follows :

> "(15)..plaintiffs have applied to this Court for amendment of the plaint by raising, in the alternative, a claim for damages for breach of contract for non-delivery of the goods. The respondents resisted the application. They contend that the amendment introduces a new cause of action, that a suit on that cause of action would now be barred by limitation, that the plaintiffs had ample opportunity to amend their plaint but that they failed to do so, and that owing to lapse of time the defendants would be seriously prejudiced if this new claim were allowed to be raised. There is considerable force in the objections. But after giving due weight to them, we are of opinion that this is a fit case in which the amendment ought to be allowed. The plaintiffs do not claim any damages for wrongful termination of the agreement. What they claim is only damages for non-delivery of goods in respect of orders placed by them and accepted by the defendants prior to the termination of the agreement by the notice. Clause 14 of the agreement expressly reserves that right to the plaintiffs. The suit being founded on Ex.A, a claim based on cl.14 thereof cannot be said to be foreign to the scope of the suit....The prayer in the plaint is itself general and merely claims damages. Thus, all the allegations which are necessary for sustaining a claim for damages for breach of contract are already in the plaint. What is lacking is only the allegation that the plaintiffs are, in the alternative, entitled to claim damages for breach of contract by the defendants in not delivering the goods..."

4 A.I.R.(32) 1945 Madras 33

5 A.I.R.1957 S.C.357

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

"(16) It is no doubt true that Courts, would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But, that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interest of justice."

The majority decision of the Apex Court is a step towards amendment.

4) In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil[6], while dealing with the provisions of the Limitation Act and Order 6 Rule 17 C.P.C., the Supreme Court clarified that when an amendment can be allowed and whether such an amendment is taking away the right accrued to the party by lapse of time.

5) The following observations of Justice Batchelor made in Kisandas Rupchand v. Rachappa Vithoba[7] are reiterated by the Apex Court :

"All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.... but I refrain from citing further authorities, as, in my opinion, they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where a plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused : to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same : can the amendment be allowed without injustice to the other side, or can it not ?"

6) In A.K.Gupta & Sons v. Damodar Valley Corpn.[8], the Supreme Court once again held as follows :

---

6 A.I.R.1957 S.C.363

7 53 Bombay 644 at p.655

8 AIR 1967 Supreme Court 96

https://hcservices.ecourts.gov.in/hcservices/

"It is not in dispute that at the date of the application for amendment a suit for a money claim under the contract was barred. The general rule, no doubt, is that a party is not allowed by amendment to set up a new cause of action particularly when a suit on new case or cause of action is barred : Weldon v. Neale,[9]. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation."

"The principal reasons that have led to the rule last mentioned are first, that the object of Courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes (Cropper v. Smith)[10], and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said to be amended."

"The expression "cause of action" in the present context does not mean "every fact which it is material to be proved to entitle the plaintiff to succeed" as was said in Cooke v. Gill[11], in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in Robinson v. Unicos Property Corporation Ltd.[12], and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words "new case" have been understood to mean "new set of ideas": Dornan v. J.W.Ellis and Co. Ltd.[13]. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

---

9 (1887) 19 QBD 394
10 (1884) 26 Ch D 700 (710-711)
11 (1873) 8 CP 107 (116)

12 1962-2 All ER 24

13 1962-I All ER 303

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

7) In Punjab National Bank v. Indian Bank and Another[14], it is held in paras 16 and 18 as follows :

> "(16) It can, however, be said that there is some vagueness in the plaintiff's case regarding the claim and decree in terms of dollar or rupee but there can always be an amendment of the pleading to clear such confusions and vagueness.
>
> In Laxmidas Dahyabhai Kabarwala v. Nanabhai Chunilal Kabarwala and Ors.[15],it has been held that amendment can be refused when the effect of it would be to take away from a party a legal right which had accrued to him by lapse of time. It may be so when fresh allegations are added or fresh reliefs are sought by way of amendment. But where the amendment merely clarifies an existing pleading and does not in substance add to or alter it, there is no good reason not to allow the same nor even the bar of limitation would come in the way. No fresh allegations of facts have been introduced/or added nor any fresh cause of action or new relief is sought to be added. A matter already contained in the original pleading can always be clarified and such an amendment should ordinarily be allowed and in such a case the question of bar of limitation would not be attracted. The case in hand is not one in which something fresh or new is sought to be added. The claim in terms of dollars has been made in different paragraphs of the plaint as well as in Clause (v) of the prayer clause, no new relief is sought to be added, only rupee equivalent of the dollar, is sought to be deleted and a clear prayer for decree in dollars would, resultantly remain there, by deletion of rupee component equivalent to the dollars. In our view, no question of introducing any new case, a new cause of action or seeking new relief which may be barred by limitation arises. It is an amendment more clarificatory in nature.
>
> (18) The position that emerges from the decisions referred to earlier is that an amendment would generally not be disallowed except where a time barred claim is sought to be introduced, there too it would be one of the factors for consideration or where it changes the nature of the suit itself or it is mala fide or the other party cannot be placed in the same position had the plaint been originally filed correctly, that is to say, the other side has lost right of a defence by subsequent amendment. We find that no such element is present in the case in hand so as to disallow the amendment in the plaint. No undue

14 2003 (2) CTC 437 (SC)
15 1964 (2) SCR 567

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

advantage is sought to be taken as the claim in terms of dollars is mentioned in the plaint and the relief clause and the defendants are not to be taken by surprise. The amendment only clears the confusion, if any, as to the terms in which relief is sought. It does not revive a time barred and dead claim, nor changes the nature of the suit. In the facts and circumstances, it cannot be said to be mala fide either."

In para 20, it is observed that there would be a huge difference of amount in terms of money if the amendment is permitted. The difference in amount being huge would not be a legitimate ground to deny the amendment of plaint, which otherwise passes the test of all the conditions under which normally amendment is to be allowed.

8) Pankaja v. Yellappa[16] –

Para-12 : So far as the Court's jurisdiction to allow an amendment of pleadings is concerned, there can be no two opinion that the same is wide enough to permit amendments even in case where there has been substantial delay in filing such amendment applications. This Court in numerous cases has held the dominant purpose of allowing the amendment is to minimize the litigation, therefore, if the facts of the case so permit, it is always open to the Court to allow applications in spite of the delay and laches in moving such amendment application.(underlining is ours)

Para-13. But the question for our consideration is whether in cases where the delay has extinguished the right of the party by virtue of expiry of the period of limitation prescribed in law,can the Court in the exercise of its discretion take away the right accrued to another party by allowing such belated amendments ?

Para-14. The law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. The jurisdiction to allow or not allow an amendment being discretionary the same will have to be exercised in a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straight jacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.

162004 AIR SCW 4522

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

Para 15. This Court in the case of L.J.Leach and Co.Ltd. and another v. Messrs. Jardine Skinner and Co., AIR 1957 SC 357, has held:-

"It is no doubt true that Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order if it that is required in the interest of justice."

Para 16. This view of this Court has, since been followed by a 3-Judge Bench of this Court in the case of T.N.Alloy Foundry Co.Ltd. v. T.N.Electricity Board and Others, 2004 (3) SCC 392. Therefore, an application for amendment of the pleading should not be disallowed merely because it is opposed on the ground that the same is barred by limitation, on the contrary, application will have to be considered bearing in mind the discretion that is vested with the Court in allowing or disallowing such amendment in the interest of justice."

9) V.R.Nathan v. Mac Laboratories (P.) Ltd.[17]:-

"7(3)...But in view of the imperative language of the proviso of the which requires that the Court shall grant the amendment, these submissions of Sri S.Sampath Kumar are futile. The plaintiff is entitled as a matter of right to have these amendments made and the only discretion left for the Court is about the terms, if any, on which he may be permitted to amend."

10) M.R.K.Rau v. Corporation, City of Bangalore,[18] –

"10.The contention of the Corporation that the amendment should not be allowed as the relief for damages or compensation is barred by time on the date the application is filed cannot be accepted. This contention overlooks the provisions contained in S.40 of the Specific Relief Act,1963."

"11. Sub-sec.(3) of S.40 of the Act is relevant to the case on hand. From the provisions contained in S.40 (1) and (2) of the Act, it emerges that in a suit for perpetual injunction or Mandatory injunction, the plaintiff may also claim damages and it would be open to the court to award damages in addition to or in substitution for a decree of

17 AIR 1975 MADRAS 189

18 AIR 1992 KARNATAKA 411

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

perpetual injunction or mandatory injunction provided the plaintiff has claimed damages in his plaint. Even if the plaintiff has not claimed damages in the plaint, it is open to the plaintiff to amend the plaint at any stage of the proceedings and include the claim for damages. In the light of the words "the court shall at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including just claim", contained in the proviso to sub-sec.(2) of S.40 of the Act, the court cannot refuse permission to the plaintiff to amend the plaint to include the claim for damages in a suit for perpetual injunction or mandatory injunction. Therefore, the claim for damages is inherent in a suit for perpetual injunction or mandatory injunction. Therefore, where no such relief is specifically claimed, if sought for at any stage of the proceedings, it has to be allowed to be added..."

6.00. Thus, the oldest golden case law and the latest modern case law by interpreting the law clearly says and clarifies that the settled position is that amendment of pleadings can be allowed at any stage of the proceedings, provided it is necessary for the purpose of deciding the controversies between the parties. They further clarified that even if such an amendment is barred by time, that factor is to be taken into consideration in exercise of the discretion as to whether amendment should be allowed or not and when it does not affect the cause of action and when it does not introduce a new case and when there is no serious prejudice caused to the opposite party and when such amendment is required to do justice, the Court has wide discretionary power to allow such amendment.

7.00.DECISION :

7.01.Limitation :

(i) Hon'ble Justice Tarun Chatterjee of Apex Court, delivering the judgment in Baldev Singh case (1) in para 13, held that the plea of limitation can be allowed to be raised as an additional defence by the appellants at the time of trial. Further, in para 14, it is stated that mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the respondent, so as to take away any accrued right.

(ii) While so, Hon'ble Dr.Justice AR.Lakshmanan, speaking for the Bench in Rajesh Kumar Aggarwal (2) case, categorically held that Court should allow all amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice or prejudice to the other side. It is further held that the Court should also take notice of subsequent events in order to shorten the litigation to preserve and safeguard the rights of both parties and subserve the ends of justice. The object of Order 6 Rule 17 CPC is dealt

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

with in detail and already we have noted the same.

(iii) Therefore, the point on law of limitation is well settled.

7.02. Specific Relief :

(i) A plain reading of Section 40, sub-section (2) proviso clarifies that the Court shall at any stage of the proceedings allow the plaintiff to amend the plaint on such terms as may be just, provided that no such damages have been claimed.

(ii) A combined reading of sub-section (1) and (2) with proviso clarifies that plaintiff may claim damages in suit for injunction but no relief for damages shall be granted unless the plaintiff has claimed such relief; provided where no such damages have been claimed, the Court SHALL at any STAGE OF THE PROCEEDINGS allow to amend the plaint to claim damages (emphasis supplied).

(iii) Thus, it is clear that when the plaintiff has claimed damages in his plaint, he is entitled to do so. When he intends to amend his plaint to claim such damages, where no such damages have been claimed, the Court shall have to permit the plaintiff to amend the plaint at any stage of the proceedings. The word "such damages" means, the specific damages viz., the amount of damages sought to be claimed through the amendment.

(iv) The language of Section 40 makes it clear that it is for the plaintiff to claim damages in lieu of injunction. Section 40 clarifies that if the plaintiff does not claim damages, the question of awarding damages does not arise. But when the plaintiff claimed damages and is praying for amendment to specify such damages, the plaintiff is entitled for amendment of plaint for specifying such damages, as he did not claim such damages by specifying the amount.

(v) Therefore, it is clear that in a suit for permanent injunction according to proviso to sub-section (2) of section 40, it is imperative and the Court has no option but to allow the amendment by adding the prayer for such damages, this being the provision of law.

(vi) Since the proviso to Section 40 sub-section (2) of the Specific Relief Act reads as an imperative and the Court has no option except to allow the amendment of the plaint and the fact that the application is belated is immaterial. The only discretion left to the Court is as regards the terms on which the plaintiff may be permitted to amend. Thus, any proposed amendment is to be allowed in view of the mandatory nature of the language employed under the proviso to section 40 (2) of Specific Relief Act.

7.03. ACT 22 OF 2002 :

(i) Since Section 16 (2) (b) of Code of Civil Procedure Amendment Act 2002 clearly says that the provisions of Rule 17 of Order 6 of the I Schedule has omitted by section 16 of the Amendment Act 1999, but which had been inserted by Section 7 of the Act 22 of 2002, the amended

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

provision as contained in the proviso to Order 6 Rule 17 shall not apply in respect of any pleadings instituted before the commencement of the amended Code, vide 2005 (3) CTC 321 and 2006 (5) CTC 396.

(ii) In Salem Advocate Bar Association v. Union of India[19], at para 26, it is held as follows:

> "Order 6 Rule 17
>
> 26. Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

(iii) Thus, a judicial discretion is to be exercised by Court in this regard and when the facts and circumstances are in favour of amendment, it should not be rejected.

8.00. CASE FACTS :

8.01. As a brief background, to better understand the controversy involved in this case, we may have to note some relevant facts.

8.02. Petitioner is the plaintiff and respondents are the defendants in O.S.No.45 of 1996 on the file of Sub-Court, Hosur. (They are referred to as per their status in the original suit)

8.03. Plaintiff is carrying on business in the manufacture and sale of metal caps for pharmaceutical products. Plaintiff approached the first defendant in April,1998 as to whether the first defendant could manufacture P.V.C.Wax Foam Wadds as per sample for use in the metal caps. With a positive reply, the first defendant requested the plaintiff to invest funds and supply the required raw material. Accordingly, the plaintiff supplied the raw material for trial production. The attempt was successful resulting in executing two agreements between both the parties.

8.04. The crucial terms and conditions of the two agreements are :

(i) the first defendant has to manufacture and sell LDP wadding sheets solely to the plaintiff at the rate of Rs.42,750/- per MT for a period of five years (emphasis supplied)

---

19 2005 (6) SCC 344

https://hcservices.ecourts.gov.in/hcservices/

(ii)the plaintiff has to pay Rs.5.00 lakhs as deposit to the first defendant

(iii)the plaintiff has to supply the raw materials //(iv) the plaintiff has to pay Rs.20,000/- per MT, as processing charges.

8.05. The grievance of the plaintiff is that the first defendant is receiving orders from the third parties and it is violation of the terms and conditions of agreement, resulting the institution of suit before the Sub-Court, for the following reliefs :

(i)permanent injunction restraining the first defendant from supplying or selling the expanded polyethylene known as LDPE wadding sheets to any third party except the plaintiff for a period of five years, ending with 31.07.1995 ;

(ii)direction to the defendants to pay damages to the plaintiff a sum of Rs.1.00 lakh or any other sum that may be ascertained for the defendants contravention of the exclusive agreement with the plaintiff ;

(iii)The other usual relief for costs and such other reliefs are also prayed for.

8.06. The plaintiff did not get any interim injunction. The Suit was filed on 21.10.1990 and it is pending. The five year agreement period has expired on 31.05.1995.

8.07. Hence, an amendment of plaint as sought for by the plaintiff in I.A.No.47 of 1998 was allowed to delete the prayer for permanent injunction and to add additional paras 11, 11 (a), 11 (b), 11 (c) and 11 (d), containing averments with respect to the claim of damages for the five year agreement period.

8.08. The trial in the suit has commenced and it is progressing.

8.09. Again, the plaintiff intended to amend the plaint with respect to the same relief, by replacing the words "the amount of tentative damages", and by specifying "Rs.50 lakhs towards damages instead of Rs.1 lakh", by adding para 11 (a) (a).

WEB COPY

8.10. The defendants opposed the amendment.

8.11. The learned Subordinate Judge rejected the prayer of amendment on two grounds // (i) the amended claim is barred by limitation, in view of the judgment reported in 2001 (4) CTC 174 //(ii) the present claim is not made within three years from 05.02.1998, when the earlier petition for amendment was allowed, deleting the relief of permanent injunction.

https://hcservices.ecourts.gov.in/hcservices/

8.12. Feeling aggrieved by and dissatisfied with the order rejecting the application for amendment, the Civil Revision Petition was filed and, as per the reference, we heard the learned counsel for the parties.

9.00. ARGUMENTS :

9.01. Elaborate and detailed arguments are advanced by both sides by inviting our attention to the pleadings, the orders impugned, the order in revision, the legal provisions and the rulings of Apex court and this High Court on the subject.

9.02. Mr.S.V.Jayaraman, learned Senior Counsel appearing for the petitioner, has submitted that the trial Court is not justified in disallowing the amendment and it is nothing but defeating the valuable right of the plaintiff. The forceful contention of the learned Senior Counsel is that the findings of the trial Court on the point of limitation suffer with material irregularities and illegalities. It is said that the order is contrary to Section 40 of the Specific Relief Act. While canvassing the cause for plaintiff, it is also stated that by allowing the amendment, there will be no change in the cause of action or in the nature of the suit. It is further pointed that the trial Court, having allowed the relief for damages by deleting the relief of injunction, ought to have permitted the plaintiff to specify the amount of damages of Rs.50.00 lakhs instead of Rs.1.00 lakh. It is contended that there is no malafide intention for the plaintiff in seeking the present amendment and there is no prejudice to the defendants.

9.03. Mr.S.V.Jayaraman, in support of his contention, placed strong reliance on various judgments and cited them before us, and we will deal with them in detail at the later stage of our order.

9.04. Per contra, Mr.P.Seshadri, learned counsel appearing for the respondents, submitted that the order of the trial Court is in tune with the settled legal position. It is vehemently contended that after commencement of trial, amendment of the pleading is not permissible under the present procedural law of the land.

9.05. Mr.P.Seshadri made a frontal attack on the conduct of the plaintiff and submitted that there is no justification to seek amendment for the second time, having availed the same before commencement of trial. Pointing on the law of limitation, he contended that the present amendment is sought long after three years and it is absolutely barred by limitation, as there is an inordinate delay and the plaintiff is not diligent, and hence, the prayer for such a relief is rightly rejected by the trial Court. It is also argued that the provisions of Specific Relief Act are not applicable to the instant case, as the amendment petition is filed under Order 6 Rule 17 only.

10.00.AMENDMENT IN THE PRESENT CASE :

10.01. The contents of the affidavit filed in support of the amendment in I.A.No.589 of 2002 in O.S.No.45 of 1996 clarify that there is an agreement between both the parties for supply of LDS Wadding Sheets

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

exclusively to the plaintiff by the first defendant and not to any third party and the period of agreement is five years and as there is a default on the part of the defendant, the plaintiff filed the suit, raising all the pleas and sought for injunction as well as damages and the injunction was not granted. However, in the meantime, the period of five years contract has expired and the suit could not be tried before the expiry of the said period, consequently, the relief of permanent injunction has become infructuous and as per the terms and conditions of the contract, the first defendant has to supply 10 tonnes per month for the initial six months and thereafter 15 tonnes per month for the remaining 54 months of the contract period. These facts have been clearly stated in the original plaint at the time of institution of the suit and as the first defendant did not supply the said material to the plaintiff, the plaintiff suffered damages to the tune of Rs.1,04,40,000/- as the plaintiff was deprived of the profits of Rs.12,000/- per tonne and the plaintiff is entitled to claim the said damages of Rs.1,04,40,000/- on account of breach of contract. It is also stated in the affidavit that at the time of filing of the suit, the exact quantum of damages cannot be ascertained. Hence, the damages of Rs.1,00,000/- is tentatively claimed, however, by reserving the right of the plaintiff that on ascertaining all damages, the amount will be claimed and he is ready to pay court fee, as directed by the Court. It is also stated that the contents of the relief in the plaint in the original suit discloses that on ascertaining all the remaining damages as determined by the Court, the plaintiff is ready to pay the court fee. It is now contended that before the decree is passed, the plaintiff should ascertain damages for five years and the court fee should be paid in advance and it is stated that though the law permits the claim tentatively at the time of filing of the suit the plaintiff can claim damages over the specified sum as per Section 40 of the Specific Relief Act. Therefore, the plaintiff filed a petition for amendment.

In para 6 of the affidavit, it is clarified that the proposed amendment does not change the cause of action or character of the suit or the reliefs sought for and the amended reliefs prayed for. It is clearly stated that the claim for damages is already put forth. So, it is not going to prejudice the defendant in any way. The prayer of the plaintiff is that if the amendment is not allowed, there is no opportunity for him to specify the damages and place the evidence in that regard.

10.02. The defendants resisted the prayer of the plaintiff, by filing a counter. It is stated that the entire suit is based on the breach of the agreement and the plaintiff has limited his reliefs to the injunction as well as for damages to Rs.1,00,000/- and the defendants filed written statement and the entire evidence is over and the suit is pending for arguments. It is further stated that the plaintiff filed an application to implead defendants 2 to 5 as parties and the same is allowed and again the defendant came forward with an application to amend the reliefs. The opposition from the first defendant is that the proposed amendment is belated and is barred by limitation and under proviso to Order 6 Rule 17 CPC, the amendment is not permissible after the trial is commenced. It is stated that the present application is filed long after three years and the plaintiff is not diligent and he has not explained the reasons for

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

delay. Hence, the plaintiff is not entitled for any further relief.

10.03. From the above rival contentions, it is clear that the defendant did not raise an objection about the change of cause of action or character of the suit. The defendant is also unable to raise an objection to the other crucial fact that the nature of the claim is entirely changed or new case is setup by the plaintiff for the first time. The few objections raised by the defendant are that the plaintiff is not diligent in making the application for amendment and the claim is absolutely barred by limitation and since the trial has commenced, the amendment is not permissible.

11.00.IMPUGNED ORDER :

11.01. The learned Subordinate Judge, while dismissing I.A.No.589 of 2002, observed that the amended claim is barred by limitation and in view of the judgment reported in 2001 (4) CTC 174 of the Division Bench judgment of this Court, the said amendment is not permissible. The reason for dismissal is that the present claim was not made within three years from 05.02.1998 when the earlier amendment was allowed, deleting the relief of permanent injunction. Thus, it is clear that the primary reason for rejection of the prayer is on the ground of limitation.

11.02. In the instant case, the contents of the original suit highlight the terms and conditions of the agreement. The plaintiff prayed for injunction as well as for damages and tentatively he claims Rs.1,00,000/- as damages but in the relief in para 14 (b) of the original plaint, filed on 20.10.1990, the plaintiff has fairly stated that any other sum that may be ascertained for the defendants contravention of the exclusive agreement with the plaintiff for supplying the expanded polyethlene sheets. Thus, by setting this fact that any other some that may be ascertained clearly indicates the mind of the plaintiff to claim more damages than Rs.1,00,000/- in future and now the plaintiff is specifying the damages of Rs.50.00 lakhs and he is ready to pay court fee on the same. Thus, no new case is introduced.

11.03. The suit is instituted in October 1990 i.e., much prior to the Act 22 of 2002. The period of agreement is for five years and it has come to an end by 31.05.1995. For the same reason, the plaintiff came with a plea that after the expiry period of five years, it is impossible for him to get any injunction. Therefore, in lieu of injunction, he claimed damages. Therefore, the subsequent event must be noted by the Court. The amendment sought to be allowed is based on the agreement and the amendment is only on the fact of relief and no new relief is claimed, but an amount of Rs.50.00 lakhs is to be permitted in the existing relief, the cause of action was the agreement itself on which the suit is based. Since the amendment sought is not introducing a new claim and the said claim is already based on the same cause of action i.e., the same agreement, the amendment must be permitted.

11.04. The trial Court has heavily relied on a decision reported by the Division Bench of this Court reported in //Tamil Nadu Electricity

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

Board v. T.N.Alloy Foundry Co.Ltd.[20].

11.05. It is true that in this judgment, the Division Bench of this Court was pleased to observe that the application for amendment is to substitute the figure of Rs.1295.81 lakhs in place of Rs.10.00 lakhs claimed as damages and the plaintiff cannot be allowed to enlarge the period of limitation by stating that he needs more time to quantify the amount of damages.

11.06. Thus, the reason assigned by the plaintiff is that he needs more time to quantify the amount of damages and that reason is not accepted. It is not the case before us.

11.07. The Division Bench in para 2 disclosed the facts in the above case by stating that subsequent to the filing of the suits, records have been gathered and the plaintiff, after examining the available records, felt the need to seek amendment and substitute the same. In para 3, it is also stated that in the affidavit filed with the application for amendment, no reason was set out as to why the application for amendment has not been filed within three years and a bald assertion was made that documents were available only prior to filing of the affidavit and scrutiny of the same discloses that he is entitled for a larger sum.

11.08. Under the above circumstances, the Division Bench has observed that the trial Judge ought to have considered the question of limitation on the facts of the above case.

11.09. In the case before us, the plaintiff has stated in the affidavit filed in support of the application for amendment that he prayed for injunction as well as damages and he was unable to succeed in getting injunction and the period of five years has expired, therefore, he wanted to limit his claim for damages and as he was advised that before the decree is passed, he should specify the same by ascertaining the damages for five years and court fee should be paid, therefore, he is specifying the same. In fact, he has reserved this right at the time of instituting the original suit that he is claiming damages of Rs.1,00,000/- or any other sum that may be ascertained for the contravention.

11.10. Further, in the case referred to above, the Division Bench of this Court in para 8, observed that the amendment does not alter the cause of action and mere rectification of the relief is not introducing a new cause of action. The Division Bench further observed that the plaintiff is right in that submission and held that the cause of action is different from the relief. In para 9 also, it is observed that the plaintiff no doubt did not relinquish any portion of his claim, but that does not improve the matters, as the omission to make the claim itself results in the plaintiff becoming disentitled to raise the claim subsequently.

11.11. With great respect to the learned Judges of the Division Bench, we differ in that view. The two latest landmark judgments of the Supreme

20 2001 (4) CTC 174

https://hcservices.ecourts.gov.in/hcservices/

Court in Baldev Singh(1) case and Rajesh Kumar Aggarwal case (2) clarify that the point of limitation is immaterial when the Court is called upon to determine the real question in controversy between the parties and in that direction when there is no prejudice caused to the other side. The Supreme Court also clarified that the Court should take notice of the subsequent events and should shorten the litigation to preserve and safeguard the rights of both parties and subserve the ends of justice.

11.12. Thus, the subsequent event in this case is material. In this case, the Court cannot grant injunction as five years period is lapsed. The only option is awarding damages and in such circumstances, amendment is legal.

11.13. Ordinarily, a suit is tried at all stages on the cause of action as it existed on the date of its institution, but it is open to the Court even including a Court of appeal to take notice of the events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances, where it is shown that the relief claimed originally has (i) by reason of subsequent change of circumstances become inappropriate,or (2) where it is necessary to take notice of the changed circumstances, in order to shorten the litigation or (3) to do complete justice between the parties.

11.14. In view of the above legal proposition, the Court cannot shut its eyes and cause damage to the party by not allowing the amendment. It is therefore necessary to take notice of the changed circumstances, which will have the effect of shortening the litigation and of doing complete justice between the parties.

11.15. In the instant case, the plaintiff has claimed the relief of damages alternatively and the same is permitted by the Court. Thus, Section 40 of the Specific Relief Act is as clear as day of light. The plaintiff in this case is entitled to claim damages and has legal right to seek for amendment.

11.16. In fact, in our considered opinion, there is no reasonableness on the part of the defendant to oppose for amendment. Whether there has been unreasonableness or unfairness is to be determined by reference to all the circumstances in which the material rights are created or effected. In order to establish the defence of unreasonableness or unfairness, it is necessary to point out the matters concerning the creation or qualification of the material contractual obligation which render it not fair and honest to call for its execution, it is not needful that there was any intentional unfairness of dishonesty at that time.

11.17. In our considered opinion, in this case, it is clear that we cannot term the act of plaintiff as a malafide act and the defendant could not establish the defence of unreasonableness or unfairness on the part of the plaintiff. Further, on the basis of the material placed, it appears that there is no circumstance which gives right to a position of undue influence, hardship or any kind of the nature. In the absence of such

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

special circumstances, the relief could not be refused on the ground of delay or unreasonableness or unfairness.

11.18. In the facts and circumstances of the case, it cannot be said that ascertainment of damages is uncalled for. Damages can be assessed for the loss or injury if the plaintiff has suffered, hence, damages is a relevant factor. The trial Court may refuse the case of the plaintiff and dismiss the same. It is a different issue. Therefore, as observed by the Hon'ble Supreme Court in Rajesh Kumar Aggarwal(2) case, the Court should not go into the correctness or falsity of the case in the amendment and it should not record a finding on merits of the amendment and the merits of the amendment sought to be incorporation by way of amendment are not to be adjudged at the state of allowing the prayer for amendment. The Supreme Court has indicated that if this cardinal principle has not been followed, it is nothing but injustice. Therefore, we would like to limit our decision only on the three points of reference, without touching the merits of the case.

11.19. In the instant case, the suit is instituted in October, 1990. The amendments came into force with effect from 01.07.2002. Therefore, the proviso to Rule 17 of Order 6 CPC is not applicable in the instant case, however, we clarify that those amendments under Act 22 of 2002 are applicable to the pleadings instituted with effect from 01.07.2002.

12.00.RESULT :

In the result, the reference is answered holding :

(1) that the delay in filing the application for amendment of the pleadings is not fatal when no serious prejudice is shown to have caused to the opposite party so as to take away any accrued right and the Court should take notice of the subsequent events in order to shorten the litigation to preserve and safeguard the rights of both the parties and to subserve the ends of justice and while doing so, the Court was not justified in allowing or disallowing the amendments so as to defeat the valuable rights of the parties and amendments of pleadings should be allowed which are necessary for determination of the real controversy in the suit and while doing so, the Court should not go into the correctness or falsity of the main case and it should not record the finding on the merits of the amendment as it should be done only during the trial of the suit.

(2) According to the proviso to sub-section (2) of Section 40 of the Specific Relief Act, the Court has no option except to allow the amendment for adding a prayer for damages. This being the provision of law, the same should be allowed.

(3) The proviso to Order 6 Rule 17 of Act 22 of 2002 is applicable to the pleadings instituted with effect from 01.07.2002 and not to the pleadings instituted prior to 01.07.2002 and while considering the proviso to Order 6 Rule 17, the Court has to examine in detail and commencement of trial must be understood as final hearing of the suit i.e., examination of witnesses, filing of documents, addressing of arguments etc., and the Court should not forget its unfettered discretion to allow the amendment after applying itself the judicial discretion, if there is no negligence on the part of the party.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(4) Before parting with the decisions, we are tempted to cite a paragraph from a case

Ma Shwe Mya v. Maung Mo Hnaung [21]

> "All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment **must be enjoyed and should always be liberally exercised**, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit." (emphasis supplied)

Keeping the above principle, the Court of Law has to dispense the justice.

(5) Therefore, we hold that the impugned order, disallowing the amendment, is liable to be set aside for more than one reason.

(6) In view of our aforesaid discussion, we are of the view that the trial Court has erred in rejecting the application for amendment of the plaint. Accordingly, the order of the trial Court in I.A.No.589 of 2002 in O.s.No.45 of 1996 is set aside and the application for amendment of plaint is allowed. The plaintiff is directed to proceed to the trial Court forthwith and take immediate steps for the necessary amendment as mentioned in the said application and carry out the amendment within a period of one month from the date of this order.

7) We cannot ignore the facts and circumstances of this case and, accordingly, we direct the trial Court to dispose of the suit itself within a period of three months from the date of communication of this order to it, as already there is a considerable delay by now. There shall be no order as to costs. Consequently, the connected C.M.P.No.8415 of 2003 is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dixit

WEB COPY

21 AIR 1922 PC 249

https://hcservices.ecourts.gov.in/hcservices/

To
1. The Subordinate Judge,
Hosur.

2. -do- through the Sessions Judge,
Dharmapuri at Krishnagiri.

+ 1 CC To Mr. P.Mani, Advocate SR NO. 59233

+ 2 CCs to Mr. P.Seshadri, Advocate SR NO 59230

C.R.P.PD.No.1203/2003

tm[co]
Gp/15.12.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/